



**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY**  
**CIVIL CAUSE NO: 693 OF 2019**

**BETWEEN:**

**ELINESS MANDOZO.....CLAIMANT**

**AND**

**SAMSON JOSSAM.....DEFENDANT**

**CORUM : JUSTICE RUTH M. CHINANGWA**

Liwimbi Counsel for Claimants

Kadzakumanja Counsel for Respondents

Chitao Court Clerk

**RULING ON APPLICATION TO DISMISS MATTER FOR BEING STATUTE BARRED**

**Introduction**

1. The applicant seeks damages for negligence; personal injuries; special damages and costs of the action.
2. The background to the claims is that on 29<sup>th</sup> November 2014 while in the course of employment, the claimant was trapped by a mill thereby pulling her in as a result of which she sustained serious injuries.

3. In defence the defendants opposed the claim stating that the accident was solely caused by the negligence of the claimant or contributed to by the claimant's own negligence. In addition, the defendants argue that the action is statute barred under the proviso to section 4(1) of the Limitation Act in that the cause of action arose on 29<sup>th</sup> November 2014 and the action herein was commenced on 10<sup>th</sup> September 2019, over 3 years after the cause of action arose.

#### **Affidavits in support and against the application**

4. The defendants formally made an application to dismiss the matter for being statute barred. In the affidavit sworn by Counsel for the defendants, it is argued that the claim is in essence a claim for damages arising out of employment and ought to be subject under the Workers Compensation Act under which the limitation period is 12 months. In addition, it is argued that the claimant was a casual laborer and not a worker as provided under the Workers Compensation Act. Therefore, the claimants cannot claim compensation under the Workers Compensation Act either.
5. In response, the claimants counsel through an affidavit stated that the claim was taken out in tort and not under the Workers Compensation Act. In addition, it is argued that the claim is not statute barred as the defendants acknowledged the right of the claimants claim and also requested the claimant to pend legal proceedings by its letter dated 3<sup>rd</sup> August 2017. It was added that further by its letter of 8<sup>th</sup> August 2017 the claimant acknowledged the defendants request and submitted the requested information under cover of its letter of 21<sup>st</sup> August 2017. It is argued that if at all the claimant had to take up an action against the defendant the same arose on or about 3<sup>rd</sup> August 2017 when the defendants acknowledged the right to the present action.

#### **Issue for determination**

6. This court has to determine whether the claim is statute barred?

#### **Analysis of Law and Evidence**

7. Section 4 of the Limitation Act states that

(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose, that is to say—

- (a) actions founded on contract or on tort;
- (b) actions to enforce a recognisance;
- (c) actions to enforce an award;
- (d) actions to recover any sum recoverable by virtue of written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any written law or independently of any such contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years.

7. From the forgoing it means an action for damages for personal injuries or negligence shall be commenced within 3 years.
8. The defendnats argue that the claim was brought after 3 years whilst the claimants argue that the same was because the defendnats acknowledged payment. The defendnats quote sections 22(1) and 23 of the Limitation Act in support of the argument.
9. Now sections 22, 23 of the Limitation Act do raise something interesting.
10. Section 22 of the Limitation Act states that -*Fresh accrual of action on acknowledgment or part payment*

*(1) Where there has accrued any right of action (including a foreclosure action) to recover land or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property, and—*

- (a) the person in possession of the land or personal property acknowledges the title of the person to whom the right of action has accrued; or*
- (b) in the case of a foreclosure or other action by a mortgagee, the person in possession of the land or personal property or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest,*
- (c) the right shall be deemed to have accrued on and not before the date of the acknowledgment or payment.*

*(2) Subsection (1) shall apply to a right of action to recover land accrued to a person entitled to an estate or interest taking effect on the determination of an entailed interest against whom time is running under section 13, and on the making of the acknowledgment that section shall cease to apply to the land.*

*(3) Where a mortgagee is by virtue of the mortgage in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the title of the mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the expiration of twelve years from the date of the payment or acknowledgment.*

*(4) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment:*

*Provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.*

11. A reading of the above section shows that section 22 on fresh accrual of an action arising out of part payment and acknowledgement only apply to matters pertaining to land, mortgage etc. Nowhere in the section is this exception provided for personal injury or negligence claims. This court finds that the arguments raised by the claimant cannot hold.
12. Moving on, this court has to determine whether the Limitation Act will apply to a claim for personal injury or the Workers Compensation Act is the right law. The defendnats have argued that the Workers Compensation Act only applies to workers and the claimant was not a worker. The long title of the Workers Compensation Act states that, the Workers Compensation Act is '*An Act to provide for compensation for injuries suffered or diseases contracted by workers in the course of their employment or for death resulting from such injuries or diseases; to provide for the establishment and administration of a Workers' Compensation Fund; and to provide for matters connected*

therewith or incidental thereto'. In addition, section 2 of the Workers Compensation Act states that "worker" means any person who has, whether before or after the commencement of this Act, entered into, or works under, a contract of service or apprenticeship with an employer in any employment, whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed orally or in writing or is implied:

*Provided that the following persons shall be excepted for the definition of "worker"—*

(a) *a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club; or*

(b) *an outworker;*

(c) *a tributer;*

(d) *a member of the employer's family living in the employer's house;*

(e) *a member of the armed forces of Malawi; or*

(f) *any class of persons whom the Minister may, by notice published in the Gazette, declare not to be workers for the purposes of this Act.* The allegation that the claimant was a casual employee or not has not been argued using evidence. The defendnats have made an assertion with no evidence and the claimants have not argued this point. Thus, the court cannot make a determination on a claim that has not been substantiated evidentially.

13. Be that as it may, section 23 of the Workers Compensation Act states that '*Proceedings under this Act for the recovery of compensation for an injury shall not be maintainable unless notice of the injury has been given to the Commissioner by or on behalf of the worker as soon as practicable after it has been incurred and before the worker has voluntarily left the employment in which he was injured, and unless the application for compensation with respect to such injury has been made within twelve months from the date it was incurred or, in the case of death, within twelve months from the time of death*'. This means that even if the action was one suited under the Workers Compensation Act, an action for an injury under the Workers Compensation Act can only be commenced within 12 months. This matter was commenced outside this period. Morally one would be touched and would feel for the claimant but the substantive law

cannot be ignored: **Gwede v Attorney-General** [2000–2001] MLR 145 (HC). Much as courts encourage parties to make out of court settlements, the law cannot be applied in breach. Negotiations should be carried out being mindful of the limitation periods of actions succinctly provided in the law.

14. This now draws us to the conclusion of the matter. This court has found that section 22 of the Limitation Act does not apply to this matter in that time cannot start running afresh on account of an acknowledgement. In addition, the matter being that of an injury whether under the Workers Compensation Act or as a claim for negligence the claimant commenced the action out of time having commenced the matter 4 years and 10 months after the cause of action arose. The argument that the claim is founded in tort as argued by the claimants cannot hold considering that the facts are clear and the claim as pleaded is clear in that the claim is one for damages for negligence occasioned out of an injury in at the workplace.

#### **Finding**

15. The claim is statute barred and is dismissed in its entirety.

**Pronounced this 22 day of September 2012 at LILONGWE**

A handwritten signature in black ink, consisting of a stylized 'R' followed by a long horizontal stroke that curves upwards at the end.

**R.M CHINANGWA**

**JUDGE**